SUPREME COURT, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-717

ALEXANDER J. ANTOINE and
IRENE F. ANTOINE, his wife, *Appellants,*

v.

THE STATE OF WASHINGTON, *Respondent.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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January, 1974

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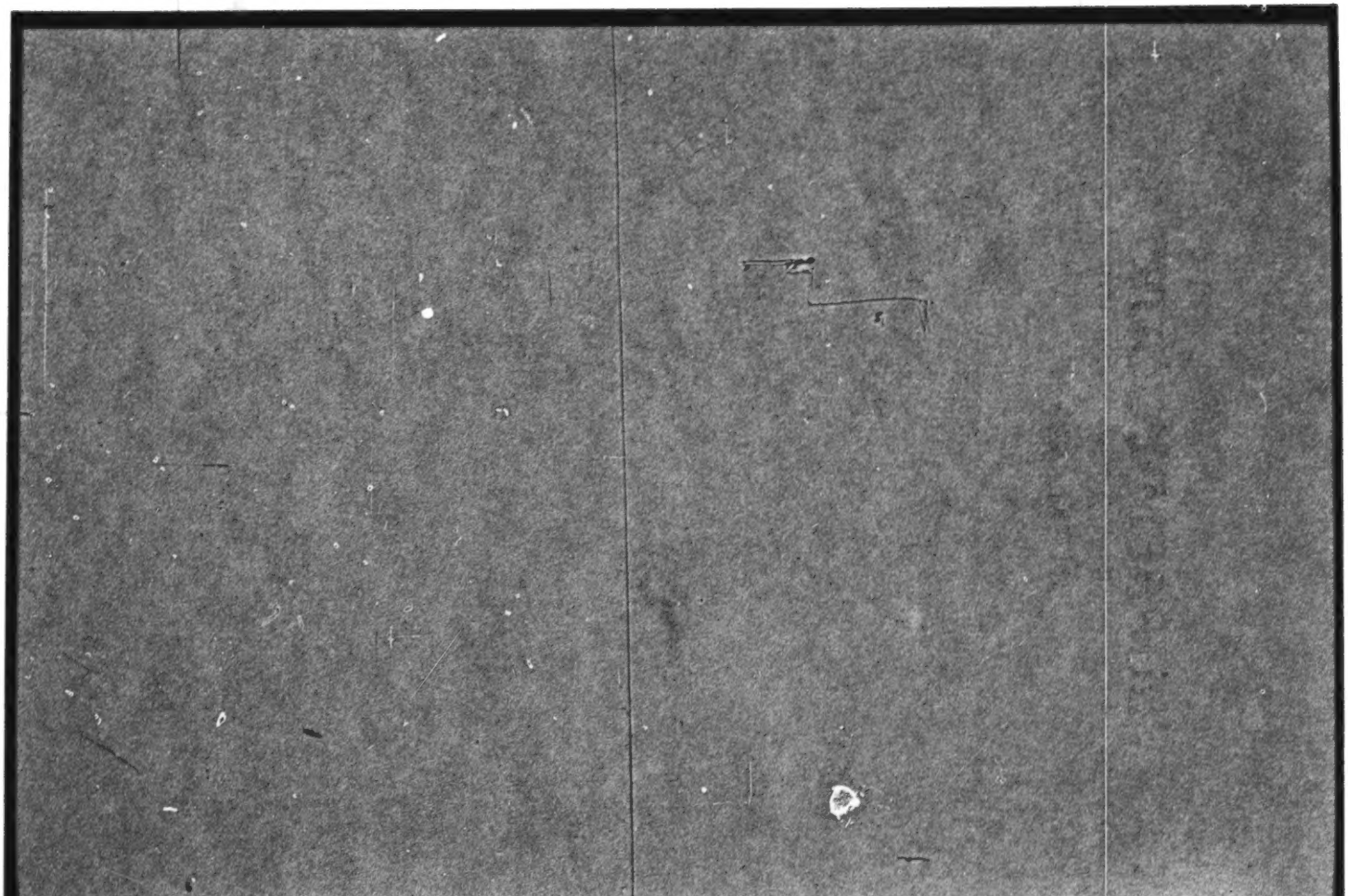

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JURISDICTION STATEMENT

Pursuant to Rule 16 of the United States Supreme Court, Respondent State of Washington moves that the above-entitled appeal from the Supreme Court of the State of Washington be dismissed and that the opinion of the Supreme Court of the State of Washington entered July 12, 1973, confirming the judgment of conviction of appellants in the Superior Court for Ferry County, Washington, Cause No. 4859, be affirmed.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported at 82 Wn.2d 440, ... P.2d ..... (1973). A copy of the opinion is reprinted as Appendix A to Appellants' Jurisdictional Statement. Findings of the Ferry County Superior Court are reprinted as Appendix B and Appendix C to Appellants' Jurisdictional Statement. The Remittitur of the Washington State Supreme Court is reprinted as Appendix D to Appellants' Jurisdictional Statement.

JURISDICTION

Respondent State of Washington concurs in the statement as to jurisdiction as set forth by appellants. (App. Br., pp. 2-3)

STATUTES AND FEDERAL LAWS INVOLVED

Respondent State of Washington concurs with the list of statutes and federal laws involved as set forth in Appellants' Brief at pages 3-4 but would point out that the following statutes are also involved in this appeal: 25 U.S.C. 71, 27 Stat. 62, 34 Stat. 80, 39 Stat. 123, 39 Stat. 672, 39 Stat. (part 2) 778.

QUESTIONS PRESENTED

Respondent disagrees with the statement of questions presented by appellants. Respondent believes that the following questions are presented by this appeal:

(1) Were the original boundaries of the Colville Indian Reservation validly diminished by Congress?

(2) Is the 1891 "Agreement of Sale" between the Colville Indian Tribe and the Federal Government a treaty within the meaning of the Supremacy Clause of Article VI of the Constitution of the United States?

STATEMENT OF THE CASE

Respondent concurs with the Statement of the Case as presented by appellants but points out that, in addition to the Statement of the Case, the following were stipulated as material facts:

(5) That the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists.

(6) That the land upon which the offenses occurred was unallotted, non-Indian land at the time of the offenses.[1]

A map was introduced into evidence by stipulation with a red circle drawn upon it indicating that the area where the offenses occurred is outside the exterior boundaries of the Colville Indian Reservation and is located on what is referred to hereinafter in this brief as the "Northern Half" of the original Colville Indian Reservation.[2]

ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

(1) Were the original boundaries of the Col-

[1] R. 50.
[2] State's Exhibit #1.

> ville Indian Reservation validly diminished by Congress?

The original Colville Indian Reservation was established by Executive Order signed by President Ulysses S. Grant on July 2, 1872. I. *Kappler, Indian Affairs, Laws and Treaties*, pp. 915-916. The original Colville Indian Reservation boundaries extended to the 49th parallel, which is the Canadian border.

On July 1, 1892, Congress opened the Northern Half of the original Colville Indian Reservation to settlement by non-Indians. 27 Stat. 62-64. The statute provides that the "Northern Half":

> be, and is hereby, vacated and restored to the public domain, not withstanding any Executive Order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. (27 Stat. at 63)

Congress has subsequently referred to the Colville Indian Reservation as "diminished" thus recognizing that the Northern Half had been effectively removed from its reservation status.[3]

The fact that the Colville Indian Reservation has been diminished was recognized by the United States Supreme Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962). In that case the Court was con-

[3] 27 Stat. 62; 34 Stat. 80, 81, 82; 39 Stat. 123 at 154; 39 Stat. 672; 39 Stat. (part 2) 778; III. Kappler, *Indian Affairs, Laws and Treaties* at p. 7; V. Kappler, *Indian Affairs, Laws and Treaties*, at p. 287.

fronted with a question of jurisdiction of the State of Washington for a criminal offense committed by a Colville Indian on the diminished reservation, i.e., Southern Half, in the town of Omak. The Court overruled the Supreme Court of the State of Washington which had previously held that the state possessed jurisdiction over the Southern Half. 351 U.S. at 357. In reaching this conclusion, the Court was careful to distinguish between the Southern Half, i.e., diminished reservation boundaries and the jurisdictional status of the Northern Half. The Court stated:

> The case turns upon the current status of the Colville Indian Reservation—a reservation created in 1872 by Executive Order of President Grant which declared that "the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for" the Colville Indians. *In 1892, the size of this reservation was diminished when Congress passed an Act providing that, subject to reservations and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the "North Half," should be "vacated and restored to the public domain.* * * *" This Act did not, however, purport to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the government for their (the Colville Indians') use and occupancy. Since the burglary of which petitioner was convicted occurred on land within the South Half, it is clear that state

jurisdiction over the offense charged, if it is to be found at all, must be based upon some federal action subsequent to the 1892 Act. (368 U.S. at 354. Emphasis Supplied.)

(2) Is the 1891 "Agreement of Sale" between the Colville Indian Tribe and the Federal Government a treaty within the meaning of the Supremacy Clause of Article VI of the Constitution of the United States?

Congress has prohibited further execution and ratification of Indian treaties subsequent to March 3, 1871:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.[4]

This Court has interpreted this statute as "prohibiting the making of any contract with the Indians by treaty." *Starr v. Long Jim*, 227 U.S. 613, 623 (1913). Congress chose to regulate its relationship with Indians by direct act of Congress rather than by the treaty making power. *Elk v. Wilkins*, 112 U.S. 94 (1884); *In re Heff*, 197 U.S. 488 (1905). As noted by the court below:

> The agreement before us in this case is not a treaty and it was not signed before statehood. It is not the supreme law of the land. The statutes which are the supreme law if they are within the power of the Congress to enact, make

[4] 23 Stat. 79, 25 U.S.C. 71.

no reference to the provision (of the 1891 agreement) relied upon by the appellants.[5]

The Federal Government did not, by virtue of its 1891 agreement of sale with the Colville Indian Tribe purport to bargain away the right of the State of Washington, under its police power, to manage its own natural resources.[6] This Court has recognized that the Northern Half of the Colville Indian Reservation has been vacated as a reservation and restored to the public domain to be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The *locus in quo* occurred on public lands which are not subject to the exclusive jurisdiction of the Federal Government or the Colville Indian Tribe and which are subject to the exclusive jurisdiction of the State of Washington. *U. S. v. Pelican*, 232 U.S. 442 (1914).

CONCLUSION

For the foregoing reasons, respondent State of Washington submits that its motion to dismiss or affirm should be granted.

Respectfully submitted:

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Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General,

Attorneys for Respondent.

January 18, 1974

[5] 82 Wn.2d at 451, insert by author.
[6] The State of Washington was admitted into the Union in 1889.